UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CRIMINAL ACTION NO. 5:06 CR-00019-R

UNITED STATES OF AMERICA **PLAINTIFF**

v.

STEVEN D. GREEN **DEFENDANT**

UNITED STATES' RESPONSE TO DEFENDANT'S
MOTION TO DISMISS FOR LACK OF JURISDICTION

Comes the United States, by counsel, and responds to defendant's Motion to Dismiss for Lack of Jurisdiction. Defendant attempts to avoid federal prosecution under the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, *et seq*. ("MEJA"), for lack of jurisdiction, claiming he is still subject to the Uniform Code of Military Justice ("UCMJ"). To support this claim, Green contends that he did not complete the U.S. Army's "clearing" process and was therefore never discharged from the Armed Forces.

Green's argument is unsupported by the facts and the law. MEJA provides jurisdiction over Green's alleged crimes because at the time he allegedly committed the offenses, he was a member of the Armed Forces subject to the UCMJ. However, MEJA limits federal prosecution of members of the Armed Forces unless the member is no longer subject to the UCMJ, or the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ.

Prior to Green's arrest and indictment in this case, he had been discharged from the U.S. Army. He received his discharge certificate, a final accounting of pay was made, and contrary to

his assertions, he successfully completed Ft. Campbell's clearing process for outgoing servicemembers. Because Green was discharged from the military, he is no longer subject to the UCMJ. Therefore, MEJA confers upon this Court federal jurisdiction over Green and his alleged offenses. For these reasons and those provided below, the motion should be denied.

I. Facts

On February 16, 2005, Green enlisted in the U.S. Army, 101st Airborne Division, and became subject to the UCMJ. Gov. Ex. 1. In September 2005, Green was deployed to Iraq. Gov. Ex. 2. On April 14, 2006, his Company Commander, CPT John Goodwin, notified Green that Goodwin was initiating action to separate Green from the military for a personality disorder and "continued poor performance" pursuant to Army Regulation ("AR") 635-200 5-13. Gov. Ex. 3. On April 2, 2006, Brigade Commander, COL Todd Ebel, requested Green's release from theater in Iraq on grounds of a discharge for personality disorder. Gov. Ex. 4.

After Green's arrival at Ft. Campbell, he received orders dated May 9, 2006, which reassigned him to the U.S. Army transition point for transition processing, required him to complete the preseparation counseling checklist, and instructed him to contact the Army Career and Alumni Program Center ("ACAP"). Gov. Ex. 5. On May 11, 2006, Green received counseling on transition benefits and services and completed the preseparation counseling checklist. Gov. Ex. 6. That same day, the Chief of Ft. Campbell's In/Out Processing certified that Green had completed installation clearance and was scheduled for departure. Gov. Ex. 7. His May 9th orders were stamped "FINAL INSTALATION CLEARANCE" on May 15, 2006. Gov. Ex. 8. After receiving final pay, he was issued a Certificate of Discharge, which officially recorded his discharge from the U.S. Army as May 16, 2006. Gov. Ex. 1.

On June 30, 2006, Green was arrested on a federal criminal complaint. *See* Arr. Warr. Ret. of 06/30/06, Doc. No. 12. He was later indicted for 16 counts of conspiracy, aggravated sexual abuse, premeditated murder, and firearm charges pursuant to MEJA, and an additional count of obstruction of justice under 18 U.S.C. 1512(c)(1). *See* Indict. of 11/07/06, Doc. No. 36. The crimes of indictment were alleged to have been committed on March 12, 2006, in Mahmoudiyah, Iraq, while Green was still a member of the Armed Forces subject to the UCMJ. *Id*.

II. MEJA Provides Subject-Matter Jurisdiction Over Green's Alleged Offenses.

MEJA extends federal criminal jurisdiction to members of the Armed Forces subject to the UCMJ who engage in conduct outside the United States that would be punishable as a felony if committed in the special maritime and territorial jurisdiction of the United States. MEJA provides:

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—
>
> > (1) while employed by or accompanying the Armed Forces outside the United States; or
> >
> > (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice).
>
> shall be punished as provided for that offense.

18 U.S.C. § 3261(a)(1)-(a)(2).

The defendant does not dispute that MEJA provides federal subject-matter jurisdiction over the aggravated sexual abuse, murders, and firearm crimes he allegedly committed in Iraq.

Nor does he dispute that the alleged offenses arose out of conduct occurring while Green was a member of the Armed Forces subject to the Uniform Code of Military Justice.

III. MEJA Provides Personal Jurisdiction Over Green Because He Was Discharged from the U.S. Army and Is No Longer Subject to the UCMJ.

Although MEJA covers offenses committed by members of the Armed Forces, "[n]o prosecution may be commenced against a member of the Armed Forces subject to [the UCMJ] … unless (1) such member ceases to be subject to [the UCMJ]; or (2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to [the UCMJ]." 18 U.S.C. § 3261(d)(1)-(d)(2).

The Supreme Court makes clear that discharged individuals are not subject to the UCMJ. "A soldier who violates military law while a member of the Army, but who is discharged prior to any action being taken with a view toward court-martial, is a civil person and may not be subjected to court-martial jurisdiction." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955). Indeed, the discussion of Rule 202 in the Manual for Court Marshal ("RCM") states: "the delivery of a valid discharge certificate or its equivalent ordinarily serves to terminate court-martial jurisdiction." R.C.M. § 202(a)(2)(B).[1]

Although at the time Green allegedly committed the offense, he was a member of the Armed Forces and subject to the UCMJ, he has since been discharged from the U.S. Army. Thus, he is no longer subject to the UCMJ, and MEJA provides the Court jurisdiction over him.

[1] The discussion to the RCM identifies select instances in which a discharge will not preclude subsequent court-martial jurisdiction. *See, e.g.*, R.C.M. § 202(a)(2)(B)(iii)(a)(1) (the discharged soldier reenters military service); R.C.M. § 202(a)(2)(B)(iii)(c) (the discharged soldier remains in the custody of the Armed Forces); R.C.M. § 202(a)(2)(B)(iii)(d) (the discharged soldier was found to have fraudulently obtained his discharge). The defendant, however, does not argue that any such exception or other circumstance identified in R.C.M. § 202(a)(2)(B)(iii) applies in this case.

A. A Valid Discharge Requires Delivery of a Discharge Certificate, Accounting for Final Pay, and Participation in the "Clearing" Process.

The U.S. Court of Military Appeals requires that three elements be satisfied to accomplish an early discharge: (i) there must be a delivery of a valid discharge certificate; (ii) there must be a final accounting of pay made; and (iii) a soldier must undergo the "clearing" process under the appropriate service regulations. *United States v. King*, 27 M.J. 327, 32 (C.M.A. 1989).

The first two *King* requirements are based on Title 10, United States Code, Section 1168, which provides: "A member of an armed force may not be discharged or released from active duty until his discharge certificate . . . and his final pay . . . are ready for delivery to him." 10 U.S.C. § 1168, *cited in King*, 27 M.J. at 32.

King's third prong arises out of Title 10, United States Code, Section 1169(1), which grants discretion to the Secretary to prescribe the manner of early discharge. *King*, 27 M.J. at 32 (citing 10 U.S.C. § 1169(1) ("No regular enlisted member of an armed force may be discharged before his term of service expires, except . . . as prescribed by the Secretary concerned")). Although Section 1169(1) has spurred creation of a web of Army regulations concerning separation of personnel, the statute itself does not set forth the requirements of a "clearing" process. Nor has any court, including *King*, sought to define "clearing" or imposed minimum or ideal "clearing" standards. Rather, courts have characterized *King*'s "clearing" process as mere "administrative out-processing," "out-processing," or "transition processing." *See United States v. Harmon*, 63 M.J. 98, 102 (C.A.A.F. 2006); *United States v. Melanson*, 50 M.J. 641, 643 (A. Ct. Crim. App. 1999); *Wilson v. Courter*, 46 M.J. 745 (A.F. Ct. Crim. App. 1997).

B. Green Received His Discharge Certificate, He Received Final Pay, and He Completed the Clearing Process.

The defendant does not dispute that he received his discharge certificate and final pay. And there is no question that he completed the Army's clearing process. After arriving in Ft. Campbell from Iraq in May 2006, Green was ordered to report to the U.S. Army transition point for transition processing and to contact ACAP. Gov. Ex. 5. As part of his participation in transition processing and interaction with ACAP, Green was provided briefings and counseling on transition benefits and services. Gov. Ex. 6. Like every other soldier departing the service at Ft. Campbell, he was provided with a preseparation counseling checklist, which allowed him to personalize his counseling based on separation topics of interest to him. *Id*. After he completed his counseling and transition point briefings, he was issued his Memorandum of Installation Final Clearance from the Chief of In/Out Processing (Gov. Ex. 7) and his orders were stamped, "FINAL INSTALLATION CLEARANCE" (Gov. Ex. 8). These documents certified his completion of the clearing process and made him eligible to receive his Certificate of Discharge (Gov. Ex. 1) and depart post.

This is exactly the type of standard "clearing" process or "out-processing" that *King* and other courts envisioned under 10 U.S.C. § 1169, which give effect to the Secretary's prescriptions and desires to standardize transition of personnel from military to civilian life. *See* AR 635-10 1-1 (purpose of regulations governing processing personnel for separation is to "establish standardized transition" at U.S. Army transition points). Because Green completed Ft. Campbell's clearing process, as evidenced by his Installation Final Clearance Memorandum and stamped orders of May 9, 2006, the defendant's attack on the clearing process must be construed as a challenge to the sufficiency of the clearing itself.

C. If Green's Out-Processing was Insufficient, Judicial Review is Not Required and Voiding an Otherwise Valid Discharge is Not an Appropriate Remedy.

Assuming, for sake of argument, that Green's clearing process was insufficient as alleged, this Court's itemized review of the suspect deficiencies is not required. Moreover, the invalidation of an otherwise valid discharge for such deficiencies is certainly not an appropriate remedy.

1. *King* Required a Clearing Process Not For Purposes of Mandating Judicial Review of Administrative Procedures, But In Response to a Sailor Leaving Base Without Checking Out.

In *King*, the defendant swindled military authorities into providing him an early discharge under the pretext of lengthening his period of enlistment. King had requested an early reenlistment for the purpose of extending his term in the military. 27 M.J. at 328. The Navy granted defendant's request and at a reenlistment ceremony, King was given a discharge certificate. *Id*. Upon receiving the certificate, the defendant refused to continue the ceremony. *Id*. He immediately retrieved his personal effects and left the base before checking out with his command. *Id*.

In response, military authorities charged the defendant under the UCMJ with fraudulently procuring his separation. *Id*. at 327. The U.S. Court of Military Appeals held that the court-martial was not deprived of personal jurisdiction over King, finding that mere transfer of the discharge certificate did not constitute "delivery" for purposes of 10 U.S.C. § 1168(a). *Id*. at 329. Furthermore, the court noted that there was no evidence that a final accounting of pay had been made and King had not participated in the "clearing" process as prescribed by the Secretary under Title 10, United States Code, Section 1169. *Id*. at 329.

The sufficiency of the clearing process was not at issue in *King* and has never been since. King's failure to participate in his post's clearing process (in addition to his failure to receive proper delivery of his discharge certificate and final pay) invalidated his military separation. But his failure to clear earned him not only an invalid discharge, but also a desertion charge for leaving his post. In this case, Green followed orders and reported to the transition point; he attended ACAP briefings, and received his final installation certificate. Certainly, the *King* court would not invalidate Green's discharge because of the Army's failure to provide, as Green alleges, "certain informational packets," VA benefit briefings, or information on short-term medical insurance.

2. The Court Has No Duty to Enforce the Regulations Because the Regulations Are Not Mandated by the Constitution or Federal Law and Do Not Bestow Rights on the Defendant.

No court has ever found that a transition point's clearing process was insufficient due to a breach of Army regulations and granted relief of any kind – let alone vitiate an otherwise valid discharge. Furthermore, the Court has no duty to enforce the Army's separation of personnel regulations because the regulations are not mandated by the Constitution or federal law and do not bestow rights on the defendant.

In *United States v. McGraner*, 13 M.J. 408 (C.M.A. 1982), the court emphasized that "not every regulation which deals with the administration of justice or with investigative procedures is designed to create rights enforceable by the accused." *Id*. at 415 (citing *United States v. Caceres*, 440 U.S. 741 (1979)). Indeed, the Supreme Court has held that "the duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law." *Caceres*, 440 U.S. at 749.

In this case, neither the Constitution nor federal law require the Department of Defense ("DOD") to adopt procedures or rules in regulating the clearing process. Moreover, the defendant's constitutional rights certainly have not been violated by an alleged failure to provide him a departure ceremony, a Developmental Counseling Form (DA Form 4856), or "certain informational packets."

Nonetheless, the Supreme Court, does require governmental compliance with agency regulations when the regulations are designed to "safeguard individual interests." *Id*. at 759. But here too, the Court is not bound to enforce DOD personnel regulations in this context. These Army regulations were not designed to safeguard individual interests. Rather, the purpose of the separation regulations is "to ensure readiness … of the force while providing for the orderly administrative separation of soldiers…." AR 635-200 1-1. And courts have concluded that personnel regulations do not provide individual rights or benefits on an accused. *United States v. Jenkins*, 1995 WL 329432 (A.F. Ct. Crim. App. 1995) (unpublished).[2]

In *Jenkins*, the defendant claimed that an Air Force court-martial lacked jurisdiction over him because he had been discharged from the Armed Forces. *Id*. at *1. The defendant's early separation had been approved, and he had received final accounting of pay and completed out-processing. *Id*. at *3. However, he did not receive his discharge certificate because his Sergeant, acting without orders, intentionally cancelled his early separation in the personnel computer system. *Id*. at *2. Although Jenkins's sergeant acted without authority and violated military discharge regulations, the court concluded that "the regulatory guidance for separating military members *does not confer individual rights or benefits on an accused* which would bar

[2] Pursuant to the Joint Criminal Local Rules, the United States will provide a copy of *Jenkins* to opposing counsel

court-martial jurisdiction if that guidance is violated." *Id*. (emphasis added), *citing McGraner*, 13 M.J. at 408.

If military rules regulating individuals that act without orders to halt delivery of an early discharge certificate do not confer rights on an accused, as in *Jenkins*, certainly they do not confer rights on Green to protest the sufficiency of a standard administrative out-processing procedure.

3. The Policy of Judicial Non-Intervention in the Affairs of the Military Would Suggest Caution and Restraint In Ruling On an Issue that Could Significantly Broaden Court-Martial Jurisdiction Over Ex-Servicemembers.

The instant motion requests the Court to adjudicate the propriety of a standard U.S. Army administrative out-processing procedure. However, a ruling on the matter requires the Court to navigate unchartered waters of a clearing process that is generally unfamiliar in civilian proceedings. For these reasons, the Supreme Court has long recognized a policy of judicial non-intervention in the affairs of the military. "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

Even in light of this policy, the defendant requests a ruling on the sufficiency of an administrative procedure that no military court has ever considered, let alone concluded, to be deficient. Nor did Green raise this issue when a military court would have had the opportunity to review it. From the initiation of his military separation to the receipt of his Discharge

---

upon request. Jt. Ky. Crim. Loc. R. 12.1(i).

Certificate, Green had access to a military attorney at no cost, but he never objected to his separation procedures generally or the sufficiency of the clearing process specifically.

Green's motion is all the more curious given his position, up until the filing of this motion, that he had been discharged from the U.S. Army and even sought to reenlist. In a February 15, 2007, letter to the 101st Airborne Division's Office of the Staff Judge Advocate, Green's current legal counsel proposed Green's reenlistment in the U.S. Army so that Green could subject himself to the UCMJ. Gov. Ex. 9. Green's counsel followed up with a May 10, 2007, letter to Defense Secretary Gates and Army Secretary Geren to again request enlistment and trial by court-martial. Gov. Ex. 10. Specifically, the letter explained that "*Green had been discharged from the Army when the allegations in this matter were investigated*. . . ." *Id*. at 1. (emphasis added).

But aside from the fact that Green's very own position on the matter of his discharge has flip-flopped, the larger issue to consider is this: an order granting Green's motion would provide military authorities federal court precedent to comb through personnel regulations in order to challenge standard out-processing procedures (nearly two years after the fact) in efforts to retain court-martial jurisdiction over discharged servicemembers. Given there are an estimated 23.5 million veterans today[3] and hundreds of pages of regulations regarding the separation of personnel,[4] the enormity of such a holding is breath taking.

The implication of potentially expanding court-martial jurisdiction over civilians that have been otherwise discharged from the Armed Forces has not escaped the Supreme Court. In

[3] *See* Office of Policy and Planning National Center for Veterans Analysis and Statistics, available at <http://www1.va.gov/vetdata/docs/4X6_winter08_sharepoint.pdf>, visited March 16, 2008.
[4] AR 635-10 and AR 635-200, each cited by the defendant, are but two of many personnel regulations, and number 35 and 146 pages in length, respectively.

United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), the defendant served with the Air Force in Korea and received an honorable discharge. *Id*. at 13. Five months after his separation, military authorities arrested him for murder that he allegedly committed while he was still a member of the military. *Id*. The issue before the Court was whether a 1950 Act of Congress could constitutionally subject a civilian ex-serviceman to trial by court-martial. *Id*.

The Court noted that the 1950 Act of Congress would "sweep under military jurisdiction over 3,000,00 persons who have become veterans since the Act became effective. . . . These figures point up what would be the enormous scope of a holding that Congress could subject every serviceman and woman in the land to trial by court-martial for any alleged offense committed while he or she had been a member of the armed forces." *Id*. at 19. To avoid such a possibility, the Supreme Court declared a bright-line constitutional rule: civilian ex-servicemembers that have been separated from the military cannot constitutionally be subjected to trial by court-martial, even for crimes they committed while still in the military. *Id*. at 23 (emphasis added).

Given the Supreme Court's stated reluctance to extend court-martial jurisdiction over civilian ex-servicemembers – even when faced with an Act of Congress – this Court should be especially conscious of providing individuals or agencies precedent to search hundreds of pages of Army regulations two years after discharge in order to attack a standardized administrative out-processing procedure that no military court has found reason to invalidate.

D. Defendant Presents No Evidence to Suggest the Clearing Process Was Insufficient.

If the Court deems it necessary to review the alleged inadequacies in Green's administrative out-processing procedure, an examination of the record reveals that Green

completed a standard clearance process true to the spirit of the regulations in light of the practical realities of war. Furthermore, the defendant's argument relies solely on counsel's conjecture and lacks evidentiary support.

1. Green's Preseparation Checklist, Final Clearance Memorandum, and Stamped Orders Indicate that He Completed a Proper Final Clearing Process Prior to His Discharge.

Green claims that the clearing process was inadequate because he was not briefed on VA benefits and reenlistment opportunities (AR 635-10 2-3) or his ability to seek treatment from the VA and purchase short-term medical insurance (AR 635-10 2-4). He also alleges that he was not provided a departure ceremony prior to his separation (AR 635-10 3-1) nor did he receive sufficient "out-processing" and presentation of "certain informational packets" (AR 635-10 3-6 through 3-8). These claims attack generally Ft. Campbell's preseparation counseling services and final clearance procedures at Ft. Campbell, which was Green's discharge location. However, a review of the defendant's personnel file indicates that Green's clearing duly complied with Army regulations.

First, on May 9, 2006, prior to Green's discharge, he was assigned to the U.S. Army transition point for transition processing. Gov. Ex. 2. He was ordered to complete the preseparation counseling checklist and immediately call the Army Career and Alumni Program Center ("ACAP"). *Id*. Additionally, his orders dictated that he was eligible for transitional health care under 10 U.S.C. § 1145 until November 12, 2006. *Id*.

Two days later, Green obtained and signed his Preseparation Counseling Checklist (DD Form 2648) to indicate that he "was offered preseparation counseling . . . on [his] transition benefits and services." Gov. Ex. 6, at 1. During preseparation counseling at ACAP, he chose to

accept additional information on topics such as the Department of Defense's job search website, federal employment opportunities, hiring preferences in non-appropriated funded jobs, education benefits, transitional health care benefits, VA centers, and VA disability benefits.[5] *Id*. at 1-2. That same day, Green was issued a final clearance memorandum (Gov. Ex. 7) and on May 15, 2006, his orders were stamped "FINAL INSTALLATION CLEARANCE" (Gov. Ex. 8).

Green also claims the Army failed to comply with its regulations and provide him a medical examination review as required under AR 635-10 3-6. However, the regulations make clear that there are no statutory requirements for soldiers to undergo a medical examination incident to separation. AR 635-10 2-4. Furthermore, there is no evidence that Green requested an examination nor that a physician had reason to order one. *Id*.

Finally, Green contends (again, without supporting evidence) that his unit, which was in combat, did not follow regulation AR 635-10 3-1 and provide him a proper departure ceremony prior to his separation. The regulations do not define "ceremony" or discuss the extent of the send-off. However, if the conditions of war in Yousifiyah, Iraq, were as desperate as the defendant claims (*see* Gov. Ex. 10, at 3), it would be reasonable for regulatory policies mandating parties and ceremonies to give way to the demands of war, operational readiness, and the fact that Green's discharge, although honorable, was initiated because of a personality disorder and "continued poor performance." Gov. Ex. 3.

[5] Interestingly, Green's counseling checklist indicates that he refused additional counseling on short-term health insurance coverage, veterans benefits, and numerous other topics that would have undoubtedly provided him with additional "informational packets," all of which he now complains the Army failed to provide him. *Id*. at 2.

2. Green's Failure to Surrender His Military Identification Card Does Not Invalidate His Clearing.

Green also contends that his discharge was procedurally deficient because he was not required to surrender his identification card pursuant to AR 635-10 3-14. It is true that upon his arrest in this case, Green was in possession of, and had yet to surrender, his military identification card. But Green is remiss in charging the Army with such delinquency when the duty to surrender the military identification card fell squarely on Green himself.

Chapter 3-14 does not impose an affirmative obligation on the Army to collect military identification cards prior to separation. Rather, the regulation imposes the duty on Green and makes clear that upon receiving final pay, "soldiers . . . will surrender Identification Card (DD Form 2A) or sworn statement of loss to the finance and accounting officer." AR 635-10 3-14. Green admits he received final pay; therefore, his failure to hand over his military identification points not at the Army's neglect of its regulations, but highlights Green's own reluctance to follow the rules.[6] At best, Green forgot to turn in the identification card or kept it as a souvenir. At worst, he kept it to gain continued access to military installations and services until its date of expiration. Either way, Green's own delinquency in the matter cannot possibly taint the clearing process and act to invalidate his discharge.

3. Green's Commander Counseled Green Appropriately and Notified Him of the Initiation of Military Separation Based on Personality Disorder.

Green contends the U.S. Army violated preseparation counseling requirements of AR 635-200 1-16. Specifically, he argues "there is no evidence in this case that this regulation was followed prior to the command's processing of PFC Green for a personality disorder." Def. Mot.

of 02/15/08, Doc. No. 99, at 7. But Green's argument in this regard is unsupported by the facts and the requirements of the regulation.

AR 635-200 1-16 requires commanders to ensure adequate counseling and rehabilitative measures before initiating military separations for personality disorders. *See* AR 635-200 1-16. Under the regulation, commanders must notify the soldier of his deficiencies and engage in at least one counseling session, which must be recorded on DA Form 4856, entitled "Developmental Counseling Form." *Id.*

On April 16, 2006, Green acknowledged receiving notice from his Company Commander CPT John Goodwin that Goodwin was initiating action to separate him based on a personality disorder. Gov. Ex. 3, at 3. Goodwin's memorandum of intended separation advised Green of his right to consult with military counsel, to submit written statements on his own behalf, and to obtain copies of documentation supporting the proposed separation. *Id*. at 2. The memorandum also informed Green that failure to respond within seven days would constitute waiver of such rights. *Id*. There is no evidence in the record to believe that Green invoked any of these rights within the seven days.

With respect to the counseling session, defense counsel is correct that there is no documentary record of a commander's completed DA Form 4856. But this should not come as a surprise to the Court. DA Form 4856 indicates that the "form will be destroyed upon . . . separation at ETS." Gov. Ex. 11, at 1. Therefore, when Green was discharged on May 16, 2006, any DA Form 4856 associated with his file would have been destroyed. Thus, the fact that

[6] Whether Green perjured himself in providing a statement of loss is unknown.

Goodwin's DA Form 4856 does not exist is more a testament to the validity of Green's discharge than a regulatory misstep as the defense would have the Court believe.

In addition, the mere fact that there is no record of a DA Form 4856 does not mean that CPT Goodwin failed to provide counseling. In CPT Goodwin's Memorandum to his Battalion Commander regarding the initiation of Green's separation, CPT Goodwin specifically stated that "Paragraph 1-16 counseling is required and is attached with the soldier's counseling packet." Gov. Ex. 12, at 1. This indicates that CPT Goodwin understood the obligations under AR 635-200 1-16 and conducted counseling as appropriate. The fact that these forms are now not part of the record does not suggest a regulatory breach or that the counseling did not happen.

4. SGT Yribe is Not a Commander and Could Not and Did Not Initiate Green's Military Separation.

Green finally argues that the Army did not comply with Army Regulation 635-200 5-13, which addresses the separation of servicemembers who have been diagnosed with a personality disorder. Chapter 5 states, "[c]ommanders will not take action prescribed in this chapter in lieu of disciplinary action solely to spare a soldier who may have committed serious acts of misconduct for which harsher penalties may be imposed under the UCMJ." AR 635-200 5-13.

Green contends that the U.S. Army violated this regulation when Green's co-conspirator SGT Anthony Yribe "ordered PFC Green to get out of the Army knowing at the time of the order that PFC Green had claimed participation in the killing of four Iraqi civilians."[7] Def. Mot. of 02/15/08, Doc. No. 99, at 8. Green suggests that Yribe was "arguably Green's "commander."

[7] To be clear, when speaking with Sgt. Yribe, Green did not "claim participation in the killing of Iraqi civilians" as the defense notes. Rather, Green admitted to Yribe that he killed the Iraqi family.

Id. But to argue that SGT Yribe was Green's commander misreads the pertinent Chapter 5 regulations.

Generally, the term "commander" is a military term of art, and includes only commissioned officers. RCM 103(5) (" 'Commander' means a commissioned officer in command. . . ."). But all commissioned officers are not necessarily "commanders." In the context of Chapter 5 separation proceedings, Green's "commander" was Platoon Commander CPT John Goodwin. *See* AR 635-200 5-13. SGT Yribe, an E-5 at the time, was not Green's commander under any definition and could not begin to take Chapter 5 separation action. Furthermore, it was weeks *after* Green's U.S. Army discharge that Green's chain of command learned of his alleged involvement in the rape and murders of March 12, 2006. Therefore, his "commander" could not possibly have taken action to effect his discharge in lieu of court-martial because his commander had yet to learn of his involvement in the alleged crimes.

IV. Conclusion

MEJA provides this Court jurisdiction over the defendant and his alleged offenses. Green is no longer subject to the UCMJ because he has been discharged from the U.S. Army. He received a Discharge Certificate, a final accounting of pay, and he completed Ft. Campbell's final clearing process. The defendant provides no authority for this Court to evaluate the sufficiency of the clearing process nor is there authority to do so. Certainly, no authority would suggest that this Court invalidate Green's discharge due to an insufficiency in an administrative out-processing procedure – especially when Green himself has admitted to his discharge and even sought to reenlist.

Given these factors, the judicial policy of non-intervention in the affairs of the military mandates caution; especially in creating precedent that could vastly broaden UCMJ jurisdiction over discharged servicemembers found to have regulatory insufficiencies, great or small, in their clearing process. Moreover, the defendant's attack of the sufficiency of the clearing process is not based in fact. Rather, the record supports a finding that the Army complied with its regulations and provided Green an appropriate administrative out-processing.

WHEREFORE, the United States respectfully requests that this Court deny defendant's Motion to Dismiss for Lack of Jurisdiction.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

s/ .

Marisa J. Ford
James R. Lesousky
Assistant United States Attorneys
510 W. Broadway, 10th Floor
Louisville, Kentucky 40202
(502) 582-5911
marisa.ford@usdoj.gov

s/ .

Brian D. Skaret
Trial Attorney
United States Department of Justice
Domestic Security Section
950 Pennsylvania Ave. NW, Ste. 7645
Washington, DC 20530
(202) 353-0287
brian.skaret@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on March 21, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren Wolfe, Attorney at Law, counsel for defendant, Steven D. Green.

s/ .
Brian D. Skaret
Trial Attorney
U.S. Department of Justice